Supreme Court, U.S.
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No. 93-669

In the Supreme Court of the United States

OCTOBER TERM, 1993

F.J. VOLLMER & COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner challenges a ruling of the court of appeals granting a new trial rather than directing the dismissal of the indictment. Pet. App. A2.

1. Petitioner was charged in the Northern District of Illinois with conspiracy to defraud the United States (18 U.S.C. 371) and mail fraud (18 U.S.C. 1341). Petitioner was acquitted at trial on two of the mail fraud counts. On the remaining counts (the conspiracy count and three mail fraud counts), petitioner was convicted and sentenced to a $20,000 fine.[1] Pet. 6-7; Pet. App. A2-A3.

[1] Co-defendants Robert W. Vollmer and Dana R. Hales were acquitted at trial. Co-defendant James B. McCabe was acquitted on the conspiracy count, and the government later

The evidence at trial showed that petitioner, a federally licensed firearms seller, was involved in a scheme with Kenneth L. Nevius to engage in the illegal purchase and resale of Steyr AUG-SA assault rifles, which were subject to a federal importation ban. The importing company agreed to sell the weapons only to law enforcement agencies. Nevius, an Illinois National Guard officer, falsely represented to the importer that he was purchasing the assault rifles for law enforcement purposes. He then sold the assault rifles to petitioner. Pet. 5-6; Pet. App. A4-A5.

At trial and on appeal, petitioner claimed that the Bureau of Alcohol, Tobacco and Firearms (ATF) lacked authority to regulate the first domestic sale or transfer of firearms that have been imported for government use. Petitioner also argued that its conviction rested on a violation of a settlement agreement between ATF and the firearms importer. Petitioner claimed that the settlement agreement amounted to an improperly promulgated de facto agency rule. Pet. 7-8; Pet. App. A4, A6.

2. The court of appeals disagreed with those arguments. Pet. App. A6-A10. However, the court reversed petitioner's mail fraud convictions for lack of evidence on the ground that petitioner had not deprived the government of any property right. *Id.* at A16-A17. The court reversed petitioner's conspiracy conviction because the trial court overruled petitioner's request that the jury be polled after its

dismissed other charges against him. Co-defendant Kenneth L. Nevius entered conditional guilty pleas on three counts. On appeal, the court of appeals reversed his mail fraud conviction but affirmed his convictions on the remaining counts. Pet. App. A5-A6.

verdict. *Id.* at A19-A20. As a result, petitioner is subject to retrial only on the conspiracy count.

3. Petitioner contends that the court of appeals improperly held that ATF had the power to regulate the first resale of the assault rifles because they had been imported for government use. Petitioner also argues that the ATF's entry into a stipulation with the firearms importer limiting the resale of the assault weapons to law enforcement agencies violated the Administrative Procedure Act. Pet. App. A7, A9, A11-A12. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision grants petitioner a new trial on the conspiracy count. If petitioner is acquitted following a trial on the merits, petitioner's contentions will be moot. If, on the other hand, petitioner is convicted and its conviction is affirmed on appeal, petitioner will be able to present its contentions to this Court, together with any other claims it may have, in a petition for a writ of certiorari seeking review of the final judgment against it. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1993

[2] Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.